# Real Estate Transactions Cases and Materials (5th ed.)

VOLUME V

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# REAL ESTATE TRANSACTIONS

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VOLUME V

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## VOLUME V

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PART IV TRANSFER

CHAPTER XXXII

# TRANSFER BY MORTGAGEE

## Introduction

Frequently, a mortgagee does not want or cannot afford to wait until the mortgage maturity date for the repayment of the mortgage debt. The debt, and the mortgage, as security for its repayment, are therefore sold to a third party. The third party may pay more or less than the present balance of principal and interest owing on the mortgage, depending upon the desirability or otherwise of the mortgage being purchased (debtor's reliability, mortgage priority, interest rate, prepayment rights, etc.). The mortgage will be "assigned" to its purchaser by an "assignment of mortgage" document which conveys the debt and the interest in land to the new mortgagee. The materials in this Chapter consider what rights the new mortgagee has against the mortgagor, and what rights of the mortgagor are cut off by the mortgagee's assignment.

Falconbridge on Mortgages (4th ed., 1977) at p. 253:

### §11.2 Assignment of Mortgage Debt[32]

A mortgagee may transfer his interest in the land without the concurrence of or notice to the mortgagor, and the mortgage debt necessarily passes as incident to the security,[33] but in order that the transferee may be entitled to sue upon the covenant for payment there must be an assignment of the mortgage debt,[34] and a transfer of a mortgage usually contains such an assignment. The debt was formerly not assignable at law,[35] in accordance with the general rule applicable to choses in action;[36] and, for the purpose of circumventing the rule that any action against the debtor must be brought by the original creditor, it became customary to insert in the transfer of a mortgage a power of attorney authorizing the assignee to bring an action in the name of the assignor. At one time this use of a power of attorney was countenanced by the courts of law only if the person to whom it was given was the creditor of the person who gave it, but subsequently the power of attorney might be given to any one, and thus the common law, without abandoning in theory its doctrine that a chose in action was unassignable, to a certain extent abandoned the doctrine in practice in the case of debts.[37]

The change of attitude of the common law was doubtless due to the fact that equity, which recognized the assignability of equitable claims or choses in equity,[38] had also at the beginning of the eighteenth century begun, in certain circumstances, to assist assignees of legal debts and of other things recognized by the common law as choses in action.[39] The result is commonly, but loosely, expressed by the statement that choses in

CHAPTER XXXIII

# TRANSFER BY MORTGAGOR

## (a) Introduction

The fact that a debtor has mortgaged his property does not mean that he will not want to sell whatever interest remains vested in him after the mortgage. (This interest is frequently referred to as the mortgagor's "equity".) In this Chapter, we will examine the problems that arise when the mortgagor proposes to "sell his equity". Many of the issues are conveniently summarized in:

> Hefferon, D.C., Cases and Materials, 1975 (Osgoode Hall Law School, at p. 3.4.1. reproduced below.

The mortgagee's ultimate security is the mortgaged property although, of course, he is vitally interested in the strength of the covenant to repay the mortgage debt, that is, in the financial position of the person or persons liable under the covenant to pay.

Can the mortgagee control the mortgagor's selection of an assignee of the equity of redemption by a covenant requiring the mortgagee's approval of prospective assignees before the assignment is made? In landlord and tenant law, the developed common law is that a covenant given by the lessee against assigning or subletting without the lessor's consent is perfectly valid. The courts take the view, apart from statute, that the lessor as the owner of the reversion which will fall into possession on the termination of the lease, should be allowed to protect himself at least against assignments to financially irresponsible people or those who are likely to permit the property to deteriorate or to be damaged. The lessor's interest countervails that of the lessee to be free to alienate to whomever he pleases. In the case of a lease of residential premises, the qualification now is to be read into such a covenant that such consent will not be arbitrarily or unreasonably withheld. (1)

One might have expected a similar approach to be taken in the case of covenants requiring that a mortgagee approve each assignee of the equity of redemption. However, it seems clear that such a stipulation will be treated as an illegal restraint on alienation and void. (2)

Apart from the use of a restraint provision, the mortgagee must rely on covenants respecting the use of the mortgaged premises, rights in tort under the law of waste and covenants respecting insurance contained in the mortgage document. What other techniques are open to a mortgagee wishing to protect his position?

NOTE:

The case of Bahnsen v. Hazelwood referred to above, stands alone in Ontario. In the United States, the very similar "due on sale" (acceleration of the debt upon sale to a purchaser unapproved by the mortgagee), clauses have inspired much litigation and comment. For representative views see:

> Beyond Tucker v. Lassen: The Future of the Due-on-Sale Clause in California, 27 Hastings L.J. 475 (1975); Acceleration Clauses as a Protection for Mortgagees in a Tight Money Market, 20 So. Dakota L. Rev. 329 (1975)

(b) Liability of the Mortgagor after Transfer

FORSTER v. IVEY (1901), 2 O.L.R. 480 (C.A.)

> ARMOUR, C.J.O.:—The defendant Ivey, being the owner in fee of the east half of lot number fourteen in the eighth concession of the township of Walpole, conveyed the same by way of mortgage on the 7th of January, 1887, to the accountant of the Supreme Court for securing the sum of three thousand dollars and interest, and covenanted with him that he would pay the mortgage money and interest at the times specified in the said mortgage.
>
> The defendant Ivey thereafter, on the 14th of February, 1889, conveyed the said mortgaged land to one Alexander Gracey, in fee, subject to the said mortgage.
>
> By this last mentioned conveyance the defendant Ivey ceased to have any interest in the equity of redemption of the said land and thereby lost his right to redeem the said land.
>
> His only equity then was to compel his vendee, Alexander Gracey, who took subject to the mortgage, to pay it off as fast as the mortgage money and interest fell due.
>
> On the 1st of May, 1890, the mortgagee assigned the said mortgage, and the land thereby mortgaged, and the mortgage money thereby secured, and all the covenants therein contained to the plaintiff.
>
> And on the 22nd of December, 1894, the said Alexander Gracey conveyed the said mortgaged land to one Alfred Gracey, in fee, subject to the payment of the said mortgage.
>
> The mortgage money fell due on the 10th of January, 1895, and I find that the plaintiff for good consideration extended the time for the payment of the said mortgage money by Alfred Gracey until the 10th of January, 1896.

# PART V THE MORTGAGEE'S REMEDIES

## CHAPTER XXXIV ACTION ON THE COVENANT

### (a) Introduction

The materials in this and the succeeding four Chapters survey the basic remedies available to mortgagees when their mortgagors default. Many jurisdictions have recognized that mortgagee-mortgagor relationships present unique problems and, either judicially or legislatively, have adopted "codes" to assure due process and fairness in enforcement proceedings. In Ontario, mortgagees have greater freedom than their counterparts in many jurisdictions. Where control of their activities has been introduced, marked discrepancies appear in the extent to which mortgagors are protected in different mortgagees' actions. Questions of the appropriate mix, balance and control of mortgagees' remedies should be kept in mind constantly as you read the materials in these five Chapters.

### (b) Actions of the Mortgagee Preventing Suit on the Covenant

BURNHAM v. GALT (1869), 16 Gr. 417.

The bill in this case set forth that on the 1st of February, 1863, the plaintiff executed a mortgage to the defendant Cockburn on lot 8, in the 6th concession of Seymour, for securing the payment of $2000 and interest; subsequently thereto the plaintiff sold and conveyed to defendant Pentland the equity of redemption in the said land and premises; and that thereafter, Cockburn assigned the mortgaged premises and moneys secured thereon to the defendants Galt and Todd by way, as it seemed, of sub-mortgage. The bill further stated that Galt and Todd had, sometimes at the request of Pentland, and dealing with Pentland as the owner of the equity of redemption, released and transferred to devers persons said mortgaged premises.

The plaintiff submitted that the sale of the equity of redemption to Pentland constituted Pentland the principal debtor, and the plaintiff a surety merely, and that as such he was entitled to redeem the mortgage premises; and that Galt and Todd were bound to have so dealt with the property as to have been in a position to reconvey to plaintiff on his paying the amount due; but that they, by the violation of such their obligation, had released plaintiff from his liability as mortgagor to make good the balance of the mortgage

QUESTION:

A and B are the owners of Blackacre and Whiteacre, respectively, in fee simple. In a single document they mortgage the two parcels to X and use the proceeds of the mortgage loan in a business venture. There is default under the mortgage and X obtains a final order of foreclosure against both A and B. X then sells Blackacre for less than the mortgage debt and brings an action on the covenant against A and B for the deficiency. Should he succeed?

See: Rushton v. Industrial Development Bank of Canada, [1973] S.C.R. 550; (1973), 34 D.L.R. (3d) 582.

The Registry Act, R.S.O. 1970, c. 409.

**61.** Every certificate of payment or discharge of a mortgage or of the conditions therein or of the land or any part thereof, at any time given, and whether before or after the time limited by the mortgage for payment or performance, if in conformity with this Act and the regulations is, when registered, a discharge of the mortgage or of the land described in the certificate, as the case may be, and is as valid and effectual in law as a release of the mortgage or of the land and as a conveyance to the mortgagor, his heirs or assigns of the original estate of the mortgagor therein. R.S.O. 1960, c. 348, s. 70; 1966, c. 136, s. 29.

NOTE:

Assuming that the mortgagor pays the mortgage debt, there is occasionally some dispute as to whether he is entitled to an assignment of the mortgage or only to a discharge.

## CHAPTER XXXVI FORECLOSURE

### (a) Introduction

You will probably have little difficulty in comprehending the general nature of foreclosure; by now it should be reasonably clear. Recall (or re-read) the passage reproduced on pages 1132-3 from An Introduction To The History of Land Law, by Simpson. There it was suggested that foreclosure was an inevitable result of the creation of the equity of redemption: once the Chancellor had permitted the mortgagor to redeem his property after the date fixed for payment had passed, then he was obliged to set some limit to his mercy. At first this limit took the form of a decree for foreclosure alone, or what is occasionally referred to, for the sake of convenience and clarity, as strict foreclosure. Here after the morttagor had been given a reasonable time within which to pay the debt secured the Court of Equity announced that he "do from henceforth stand absolutely debarred and foreclosed of, in, and to the said mortgaged premises." On its face, this decree put an end to any interest the mortgagor had in the property, for he had lost his legal claim once the date for payment had passed (recall or re-read Plucknett's discussion of the attitude of the common law courts reproduced on pages 1128-31). The mortgagee now seemed to be the sole owner of the property, although we shall soon see that the mortgagor might still persuade the Court of Equity to re-open the foreclosure despite its awesome judgment.

For about two centuries this was the standard form of foreclosure. You may think it was rather unfair to the mortgagor: the poor chap was faced with the prospect of losing his land and still owing the original mortgage debt. You need not feel sorry for him; in fact, you might more properly feel some sympathy for the mortgagee. The foreclosure process was encrusted with substantive and procedural limitations favouring the mortgagor. "In England, ... the demand for reform in foreclosures came from mortgagees, not mortgagors; the changes which were made by the courts and Parliament in the English law of foreclosure during the nineteenth century were designed to relieve mortgagees, not mortgagors" (Tefft, The Myth of Strict Foreclosure, 4 U. of Chicago L. Rev., (1937), 575, 577). During the first half of the nineteenth century mortgagees gradually became entitled to demand a sale, that is, a sale of the mortgaged property supervised by the Court the proceeds of which were available to satisfy the mortgage debt.

Both foreclosure alone and foreclosure converted into a sale available and in common use today. Although their main outlines are relatively simple, the details are wonderfully difficult and complex. So much is omitted from the following materials, particularly of a procedural nature, that they may well distort reality, and not merely simplify. Nevertheless, you will probably not complain that the problems are too easy. They are not. One of the major difficulties will be to put the various pieces together into a comprehensive framework; with this in mind, here is a "table of contents":

NOTE:

Where an action is for foreclosure alone, all those being foreclosed are faced with the threat that if the mortgage debt is not paid, their interests in the land will be extinguished, and the mortgagee will be the owner of the land (so long as he has included in the action all the parties with interests subsequent to his). Assume, first that the mortgagor is the only party to be foreclosed: he has not sold or leased the land, he is unmarried, and there are no other claims subsequent to the mortgage. If he has not requested time to redeem, then the mortgagee can obtain a judgment for immediate foreclosure. If he has, then the judgment allows six months for payment. If payment is made, then the action is over, and the mortgagor is again the sole owner; if it is not made, then mortgagee can obtain a final order of foreclosure, and then he will be the sole owner. The results of these alternatives are, of course, subject to the existence of claims prior to the mortgage. This much is simple.

Consider the possibility of the existence of other interests, prior to the mortgagor's, but subject to the mortgage: for example, leases or mortgages made by the mortgagor, or executions of Mechanic's Liens filed subsequent to the creation of the mortgage. Assume that the mortgagor has requested time to redeem, and first, that there is one subsequent encumbrancer, for example, a second mortgagee. If he redeems, he is entitled to an assignment of the mortgage, and to continue the action against the mortgagor. (He may make the payment at any time after the action has been begun, and before the six months expires, but no matter when he does, the mortgagor will be given another month, after the six months expires, before he must pay or be foreclosed). Next, assume there is more than one subsequent encumbrancer. If more than one wishes to redeem, then the holder of the senior claim pays first, receives an assignment of the mortgage and continues the action; the remaining encumbrancers are given one month beyond the six months to redeem, and again, seniority prevails if more than one still wish to redeem. Each one who redeems must pay the claim of the encumbrancer whom he is redeeming, together with the amount that encumbrancer himself paid to redeem. The process continues until the power to redeem is not exercised, or until the mortgagor, the holder of the last, the ultimate, interest has redeemed. In short, the holders of successive interests are entitled to redeem in the order of their priority; upon redemption they are entitled to an assignment of the mortgage, and to continue the action against subsequent claimants; sooner or later the process comes to an end, because there is no one left who either can, or wishes, to redeem.

All this must seem complicated. The mechanics probably are. Is it correct, and, if so, is it useful, to suggest that the process of redemption and successive assignment simply recognizes subsequent interests, and apportions the value of the land among them in the order of their priority, leaving to them alone the question of judging the question of value?

face of them regular, and if an abstract were made of all the papers in the cause, they would, as far as is shewn in this cause, appear to be regular It would be hard indeed if a purchaser after final order were held to be affected by errors not even discoverable upon an inspection of the papers, and not only hard, but in my judgment contrary to reason and principle. The answer denies very explicitly that the defendant had notice of this, or of any of the alleged irregularities set out in the bill.

There is another ground upon which the defendant is entitled to protection, if he paid his purchase money before this bill was filed and served. The last payment fell due on the 15th of April, 1867 ; the bill alleges that he obtained his conveyance before that date—the answer says on that date, and sets up that he was a purchaser for value without notice. I will allow him, if he desire it, to prove by affidavits, other than his own, at what date he completed the payment of his purchase money. In my view of the case, this is not necessary, but if he is advised that it will make him more safe, I will admit such proof.

The Conveyancing and Law of Property Act, R.S.O. 1970, c. 85.

61. An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want or jurisdiction, or of want of any concurrence, consent, notice or service.

NOTE:

Section 61 was originally enacted in 1886. Why protect a purchaser with notice? What about fraud? (Shades of priorities and The Land Titles Act.)

NOTE:

Only a small minority of the States of the United States permit foreclosure alone; foreclosure and sale is the standard procedure. Of the states that permit foreclosure alone, a majority allow the mortgagee to obtain a deficiency judgment; that is, to foreclose, and to bring a subsequent action against the mortgagor for the difference between the mortgage debt, and the value of the land. Would an intelligent layman find anything to object to in allowing both foreclosure and a deficiency judgment? Is it helpful, while thinking about this problem, to put it against the background of a general economic slump?

NOTE:

We have seen that any of the parties to a mortgage action, the mortgagee, a defendant, or subsequent encumbrancer can demand a sale (rules 464, 466 and 467). If a defendant does not ask for time to redeem, and if there are no subsequent encumbrancers, the mortgagee is entitled to a judgment for an immediate sale. Otherwise the judgment will generally provide for a sale at the end of six months, together with whatever extensions the mortgagor has been able to obtain. The judgment will give an opportunity to redeem to the mortgagor, but not to the subsequent encumbrancers. They cannot redeem; they simply sit, await the sale, and hope the sale price exceeds the amount of the mortgage debt, plus whatever other claims may be prior to theirs. Why? Does it help to remember the suggestion that in an action for foreclosure alone the process of redemption and assignment apportions the value of the land among the holders of subsequent interests, and to look to see whether that objective is accomplished in a different fashion where the action is for foreclosure and sale. Postpone worrying about this problem until you read about the distribution of the sale proceeds.

The Court has jurisdiction to order an immediate sale, but, generally, it is quite reluctant to exercise this power. The framework of the sale procedure is set out in the Rules of Practice. I do not think we would benefit greatly from discussing the details. The Rules give the Court, particularly the Master, a good deal of discretion in arranging the terms and the conduct of the sale. Understandably enough, there is one settled pattern which is adopted in the vast majority of cases. The conduct of the sale is given to one of the parties, almost always, the mortgagee; the sale is by public auction; and a reserve, or minimum, bid is set by the Master, which may be varied or withdrawn if

the property is not sold on the first try. I suppose it is not particularly surprising that the final sale price is usually fairly low. Could we invent a different sale technique one which would avoid the full, depressing atmosphere of compulsion? What's wrong with hiring a real estate agent? Is there any way to take advantage of private initiative by putting pressure on one of the parties, or providing an incentive? Is this just a hope of getting blood from a stone? Perhaps the fact that an action has progressed to its final stages is a sufficient indication that private initiative has failed.

There are many specific problems that could be discussed. These materials include only one; can the mortgagee purchase at the sale? In the United States, by and large, he can. During the depression of the 1930's it was common for mortgagees to purchase the property at a nominal price, and obtain a deficiency judgment virtually equal to the unpaid mortgage debt. Was this a Bad Thing? More of this later. In England, and in the Common Law provinces of Canada, the mortgagee cannot purchase without leave from the court. Leave is granted reluctantly, and usually only after several sale attempts have failed.

GUNN v. JOHNSON (1919), 46 D.L.R. 656; [1919] 1 W.W.R. 698 (Alta. S.C.)

STUART, J.:—It appears that it was agreed between the parties that it would be useless to go to the expense of a sale by auction as the property would not realize the amount standing against it.

The practice in both the master's offices has for some time admittedly been in such a case to allow the plaintiff mortgagee, if he so desires, to purchase the property at a price fixed by the master and to permit execution to issue for the balance.

The propriety of this practice has been questioned by Scott, J., in *Creighton* v. *Dunkley*, [1919] 1 W.W.R. 547, at 552. In the present instance neither party has raised any question as to the propriety of the practice, but it seems to me that the decision

so much his consent to an order of the master as his assent to a contract between the plaintiff and himself at the price and terms mentioned upon the records in the master's office. Any lingering reluctance to do so on his part would no doubt be overcome by his being presented with the alternatives I have mentioned.

The second reason is that a sale to the plaintiff by order of the master without advertising comes altogether too near the nature of foreclosure and a mere appraisement by the master of the value of what the plaintiff gets. And this is in great danger I think of leading to difficulties if there is execution to be issued for the balance. If all this is done without a virtual contract agreeing thereto by the defendant then it seems to me the way is, if not clearly open, very clearly suggested to the defendant to claim that by the issue of execution the foreclosure is opened, and that if the plaintiff is not able to reconvey the execution must be stayed. The distinction between a sale to the plaintiff without advertisement at an appraised price in the absence of contractual consent thereto by the defendant and perhaps in the face of his mere forced acquiescence, and an ordinary foreclosure is to my mind altogether too narrow and fine a one to justify any assurance that the difficulties I suggest may not ultimately arise.

However, I think, even if the general practice be proper, that the master was not in error in refusing to permit the plaintiff to become a purchaser as at a judicial sale for the sum of $12,500, and that the appeal should be dismissed with costs.

NOTE: Where a sale has been concluded in normal fashion two questions arise: How are the proceeds of the sale to be distributed, and what are the consequences of a deficiency. The answers to both are fairly straight-forward. First the distribution of the proceeds. The costs of the sale are paid, then the mortgagee, and then the subsequent encumbrancers, if any, according to their priorities; in the unlikely event there is anything left, it is paid to the defendant. Next, the consequences of a deficiency. What do I mean by a deficiency - a price inadequate to pay the mortgagee alone or the mortgagee together with all the subsequent encumbrancers? I mean a price inadequate to pay the mortgagee alone, but the question of definition is not a particularly important one. Where the sale proceeds are not sufficient to pay the mortgage debt, the mortgagee can obtain a judgment for the balance against the mortgagor (assuming he has been made a defendant: Rule 489). None of the subsequent encumbrancers have this power. They are not plaintiffs; they were included in the action simply to recognize their interests in the property.

NOTES: It is clear beyond a shadow of doubt that the courts cannot, or will not, re-open a foreclosure and sale in the same fashion, and for the same reasons, as in action for foreclosure alone. The jurisdiction exercised in Trinity College v. Hill does not extend to foreclosure and sale. Why? The traditional explanation is given in an excerpt from Standard Realty v. Nicholson, reproduced [illegible] page below.

# CHAPTER XXXVII THE POWER OF PRIVATE SALE

## (a) Introduction

All standard mortgage forms in use in Ontario contain a power of private sale; that is, a power permitting the mortgagee to sell the property after the mortgagor's default. The wording of these powers varies; some are quite short, and others are elaborate. The following sample is quite brief, but otherwise representative:

> Provided that the said Mortgagee, on default of payment for one month, may on two weeks' notice enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest and such default continue for two months after any payment of either falls due, the Mortgagee may exercise the foregoing powers of leasing or sale, or either of them without any entry or notice.

In the unlikely event that a mortgage does not contain a power of sale, The Mortgages Act, R.S.O. 1970, c. 279 implies one in the following terms:

> 23. Where any principal money is secured by mortgage of land, the mortgagee, at any time after the expiration of three months from the time of default in the payment of any moneys due under the mortgage or after any omission to pay any premium of insurance that by the terms of the mortgage ought to be paid by the mortgagor, has the following powers to the like extent as if they had been in terms conferred by the mortgage:
>
> > 1. A power to sell, or to concur with any other person in selling, the whole or any part of the mortgaged property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to buy in at an auction and to rescind or vary contracts for sale, and to resell the land, from time to time, in like manner without being answerable for any loss occasioned thereby.

Powers of this nature appeared in England in the eighteenth century. At first there was some concern whether they offended the prohibitions against restrictions on the right to redeem. Their validity was established in the early nineteenth century; they soon came to be included in virtually all mortgages, and eventually they were given the legislative approval reflected in section 23 of The Mortgages Act. Now, in England, they are used far more often than foreclosure or foreclosure and sale. They are severely curtained or forbidden in most of the states of the United States.

and the residue shall be paid to the mortgagor. R.S.O. 1960, c. 245, s. 25.

**27.** The person exercising the power of sale has power to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein of the mortgagor and of which he had power to dispose. R.S.O. 1960, c. 245, s. 26.

**28.** At any time after the power of sale has become exercisable, the person entitled to exercise the same is entitled to demand and recover from the mortgagor all deeds and documents in his possession or power relating to the mortgaged property, or to the title thereto, which he would have been entitled to demand and recover if the property had been conveyed, appointed, surrendered or assigned to and was then vested in him for all the estate and interest of the mortgagor and of which he had power to dispose, and where the legal estate is outstanding in a trustee the mortgagee, or any purchaser from him, is entitled to call for a conveyance of the legal estate to the same extent as the mortgagor could have called for such a conveyance if the mortgage had not been made. R.S.O. 1960, c. 245, s. 27.

**29.** So much of this Part as confers a power to sell does not apply in the case of a mortgage that contains a power of sale, and so much as confers a power to insure does not apply in the case of a mortgage that contains a power to insure; nor do any of the provisions of this Part apply to a mortgage that contains a declaration that this Part does not apply thereto. R.S.O. 1960, c. 245, s. 28; 1964, c. 64, s. 3.

We have already considered the exercise of the power. Next we shall examine the disposition of the proceeds and the consequences of a deficiency and then the position of the purchaser. If we had more time we would also consider some problems concerning the scope of the power: for example, what about a sale on credit, or a lease made by the mortgagee for a duration longer than the term of the mortgage? A sale on credit is quite permissible; the only question is, who shall give the credit? The mortgagee must, unless he has expressly stipulated to the contrary in the mortgage. With respect to leases, it is fairly clear that under most of the powers in common use the mortgagee may make a lease exceeding the terms of the mortgage; this question is also one that depends upon the wording of the power.

NOTE AND QUESTIONS:

After a sale, the mortgagor may well feel that the mortgagee has not obtained the best possible price. The standard of care and effort the courts have imposed on the mortgagee is, in words at least, quite clear. In Warner v. Jacob (1882), 20 Ch. D. 220, KAY, J. stated (at 224):

> (A) mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud. ...

In Kennedy v. De Trafford, [1896] 1 Ch. 762 (C.A.), LINDLEY, L.J. stated (at p. 772):

> A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all ...

If the mortgagor can show the mortgagee fell below this standard then he can recover damages for his loss. (Here we are concerned solely with the mortgagor's claim against the mortgagee; we come to the position of the purchaser later). If you had a chance to re-write the law, would you impose a higher standard on the mortgagee? Is the natural conservatism and caution of most members of the legal profession some protection for the mortgagor? Is this something you should take into account in re-writing the law?

NOTE:

The sample sale clause reproduced above (at p. 1481) gave the mortgagee power to sell on two weeks' notice, and in some events, power to sell with no notice whatsoever to the mortgagor. Since 1964, such powers must be exercised subject toTThe Mortgages Act:

The Mortgages Act, R.S.O. 1970, c. 279.

PART III

NOTICE OF EXERCISING POWER OF SALE

**30.**—(1) A mortgagee shall not exercise a power of sale unless a notice of exercising the power of sale in Form 1 has been given by him to the following persons, other than the persons having an interest in the mortgaged property prior to that of the mortgagee and any other persons subject to whose rights the mortgagee proposes to sell the mortgaged property:

because of subsequent incoming of execution creditors who should stand in no better position than the mortgagor.

The duty of the Court in interpreting a statute is to find the true intention of the Legislature by a consideration of the words used. In so doing, it is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion: *Craies on Statute Law*, 6th ed. (1963), p. 337.

In my opinion the words of s. 29 do not point unmistakably to the conclusion that the rights of execution creditors were to be increased. Accordingly, I hold that execution creditors who file their writs with the Sheriff after notice of sale has been given to the mortgagor are not entitled to notice of sale.

An order will go that the vendor has satisfactorily answered the requisition made by the purchaser. The parties have indicated that neither of them are seeking costs; accordingly there will be no order as to costs.

NOTE:

What is the effect of a failure to give notice to the mortgagor as required by The Mortgages Act, Part III?

The effect appears to vary, depending upon when the failure to give notice is discovered by a good-faith-without-notice purchaser. If the failure to give notice (or the giving of defective notice) is discovered before such a purchaser receives his conveyance (though even after he has agreed to purchase the property), the defect will be fatal to sale proceedings and the purchaser's title will be in jeopardy: see Re Hal Wright Motor Sales Ltd. and Industrial Development Bank, reproduced below. However, suppose that a purchaser learns only after the property has been conveyed to him that there was some defect in the sale proceedings. It seems that such a purchaser can look for protection in two places: (1) he can rely on purchaser protection provisions which are found in virtually every mortgagee's contractual power of sale (see the clause in the mortgage above at p.1125 providing that "any purchaser ... shall not be bound to see to the propriety or regularity of any sale ... or be affected by express notice that any sale ... is improper and no want of notice or publication when required hereby shall invalidate any sale ... hereunder.") Such clauses have been interpreted consistently to be effective, in their terms (see Dicker v. Angerstein, below); or (2) he can rely on the protective provisions contained in The Mortgages Act, above, it may be that s. 30 of that Act requires any purchaser to find his protection only within the Act. Some of the difficulties that have arisen concerning the interpretation of these protective provisions are explored below.

an action or filed a counterclaim against him in an amount that is more than the mortgage debt. The subsequent encumbrancer's mortgage is not discharged by the unilateral appropriation of an unliquidated claim by the mortgagor.[12]

It has been held that the mortgagee is entitled to pay the surplus to the apparent owner of the equity of redemption unless he has actual notice of other claims.[13] If there are conflicting claims or it is doubtful who is entitled to the money, it would seem that the mortgagee may pay it into court.[14] In England it has been held that where the mortgagee is in doubt as to the persons entitled to receive the surplus proceeds of the sale he may take out an originating summons to have the question determined.[15]

In Ontario a mortgagee holding any money out of which a married woman is dowable may pay it into court to the credit of the married woman and the other persons interested therein, and the court may make such order as may be just for securing the married woman's right of dower in the money.[16]

If the mortgagee continues to hold the surplus money it is his duty to set it apart and invest it for the benefit of the persons who may establish their claims thereto; and if he neglects to do so he will be chargeable with interest from the completion of the sale.[17]

Unless the terms of the power of sale authorize the mortgagee to sell on credit,[18] the mortgagee must account for the purchase price as if it has been received by him in cash, but if the mortgagee stands ready so to account, a sale on credit, if a real one, is a valid exercise of the power of sale notwithstanding that the power does not authorize a sale on credit.[19]

If the proceeds of the sale are insufficient to pay the amount owing on the mortgage, the mortgagee may sue the mortgagor on his covenant in order to obtain payment of the deficiency.[20]

NOTE: Where the sale results in a deficiency the mortgagee can bring an action against the mortgagor for the balance.

NOTE: It is clear that the courts will not re-open a sale under a power of sale on basis of the jurisdiction demonstrated in Trinity College v. Hill. In this respect the sale under a power of sale is similar to foreclosure and sale. The traditional explanation is given in Standard Realty v. Nicholson (1911), 24 O.L.R. 46, by RIDDELL, J.: (at 55)

> The present case (which involved a sale under a power of sale) is wholly unlike those in which, after final order of foreclosure, a foreclosure decree has been opened up and the mortgagor allowed to redeem, even (in some instances) against a purchaser. ...
>
> The practice was to apply to open up the foreclosure and the Court then exercised its discretion whether to open up the final order of foreclosure and allow the mortgagor to redeem; and this would depend upon the circumstances of each particular case. ...

I do not think the same power exists where the sale is not after final order of foreclosure, but by a mortgagee under a power of sale. ... The difference is manifest on a sale after final order of foreclosure the mortgagee has a chance of making a gain - he has not to account to the mortgagor; and, if he does not make enough to pay the amount of the debt, he cannot sue for the balance. Where the property is sold under power of sale, the mortgagee cannot make a gain; he must account for tne surplus over his debt, but he can sue if there be a deficiency. ...

Again, there is a marked difference in the power of the Court to interfere where it is a question of rights arising under its own decree, and where it is a question of rights arising from a contract. Where a person, to support his claim to land, must rely upon a judgment of the Court, the Court may well have the power to vary such judgment and the rights arising under it - but whence comes the power of the Court to interfere with rights arising under contract and independently of any Court proceeding?

HADDINGTON ISLAND QUARRY LTD. V. HUDSON, [1911] A.C. 722 (P.C.)

The judgment of their Lordships was delivered by

Lord De Villiers. This is an appeal against a judgment of the Court of Appeal of British Columbia reversing a judgment of Morrison J. in the Supreme Court, which dismissed the plaintiffs' action with costs. The plaintiffs were the mortgagors and personal representatives of mortgagors of a certain quarry known as Haddington Island, and the defendants were the assignees of the mortgage and purchasers of the quarry, the sale to the latter having been effected by virtue of a power of sale conferred on the mortgagees by the indenture of mortgage. The statement of claim contained several claims, but the claims to which the arguments before their Lordships were mainly directed were for a cancellation of the conveyance to the purchasers, and for a declaration that the plaintiffs were entitled to redeem the mortgage. The grounds upon which these claims were based were that the assignment of the mortgage did not vest in the defendant company any interest in or title to the mortgage, that there had not been a due registration either of the assignment or of the conveyance, that the defendant company had no right to exercise the power of sale, that no demand had been made on the mortgagors for payment and no notice given to them of the intended sale, and that " the defendant company did not use its best exertions, or indeed any exertions, to obtain the best price for the said Haddington

# CHAPTER XXXVIII MARSHALLING AND CONSOLIDATION

## (a) Introduction

The materials in this Chapter offer a brief glimpse at two infrequently-applicable, but important equitable doctrines. "Marshalling" really refers to a number of technical doctrines designed to insure apportionment of mortgage debts fairly where more than one parcel of land, or more than one person are liable on a mortgage debt. "Consolidation" refers to the doctrine that, at its most basic level, permits a mortgage creditor of the same debtor on two different parcels of land, in respect of different mortgage loans to require the debtor who wishes to rely on the equitable right to redeem after legal payment date, to redeem both mortgages or neither: "He who seeks equity must do equity".

The diversity of the problems that can arise, the varying fact situations in which the doctrines (particularly marshalling), may be applicable, and the infrequency of the practical relevance of these doctrines, makes extensive treatment impractical here. For further consideration of the issues, see:

Falconbridge on Mortgages (4th ed. 1977) at pp. 185-193, 309-316.
Osborne, Mortgages (2nd ed. 1970) at pp. 198-201, 579-586.

## (b) Marshalling

### ERNST BROTHERS CO. v. CANADA PERMANENT MORTGAGE CORPORATION (1920), 47 O.L.R. 362 (H.Ct.)

[In 1912, Frank and Jeremiah McAsey executed a mortgage to the defendant company of one lot owned by one of the brothers, and another lot owned by the other brother. The mortgage secured $1,200, of which $1,000 was advanced to Frank and $200 to Jeremiah. Both brothers acknowledged the receipt of the whole sum and covenanted for its repayment. In 1914, Frank charged his lot in favour of the plaintiffs to secure a loan received from them. Two years later he conveyed his property to his brother for $1,500. The conveyance made no mention of either the defendant's mortgage or the plaintiff's charge, although the evidence indicated that Jeremiah had agreed to pay off both encumbrances. He never paid anything to the defendant which exercised its power of sale on both parcels. However, only Frank's lot was sold. The proceeds did not cover either the mortgage or the plaintiff's charge. The plaintiffs brought an action for a declaration that the securities held by the defendant should be marshalled.]

# CHAPTER XXIX

## CONDOMINIUMS*

The condominium concept is relatively new in Ontario but it is already evident that it is also very complex. A thorough treatment of every problem associated with condominium development is beyond the scope of the course and would certainly require much more than one chapter in this casebook. The purpose, rather, is to expose the reader to the nature of condominiums in general, to the problems that have arisen with respect to condominiums in Ontario and other jurisdictions, and to concerns about the appropriateness of various proposals for legislative change.

The chapter is divided into 8 parts:

PART (a) is an introduction to what is meant by the term "condominium", its development at common law, and the need for an enabling statute.

PART (b) deals with "spin-offs" from the general condominium theme -- leasehold condominiums, condominiums on vacant land, stage development, air space condominiums, time-sharing, and conversion.

PART (c) outlines the general organizational framework of the condominium (e.g. what is a "unit"?; what are the "common elements"?).

PART (d) deals with the process of registering the condominium prior to a purchaser taking legal title.

PART (e) looks at what the developer is required to disclose to prospective purchasers. There is, of course, a need for adequate disclosure, but is there such a thing as too much disclosure? The related topic of consumer protection is also examined in this section.

PART (f) deals with the operation of the corporation once it is in existence. In this section the process involved in creating and amending the by-laws will be outlined, as well as the difficult problem of by-law enforcement.

PART (g) looks at the miscellaneous topics of insurance coverage, realty tax assessment and the potential liability of unit owners.

PART (h) examines what happens if there is destruction of the building or if termination of a condominium is sought.

* Most of this Chapter was compiled by Audrey Loeb Burns of the Property Rights Division of the Ministry of Consumer and Commercial Relations, and Bradley N. McLellan, Esq., a former student at this Faculty. Their contribution to this casebook is acknowledged and appreciated.

matches the offer.[183] Unless prospective purchasers are deterred by the possibility of a delayed acceptance or the embarrassment of personal rejection this form of restriction causes the unit owner no economic injury. But any limitation of an owner's free choice of buyer is a restraint on alienation and, if it is to be upheld, must be reasonable.

The condominium's power to veto the admission of a new member has two proffered aims: first, to reduce the risk of financial interdependence by excluding the economically unreliable; second, to promote the project's inner harmony by striving for compatible members.

For the condominium to consider the prospect's finances seems hardly as urgent as it might be for the cooperative. Not only is economic interdependence minimal in a condominium[184] (provided the problem of unlimited personal liability is overcome), but whenever the sale of a unit is refinanced, the purchaser's reliability will be appraised by the lender and, if there is an insured mortgage, by the FHA.

A disruptive unit owner may indeed be troublesome to his neighbors, but it is doubtful that the board of managers can predict who he will be, or that the selection process affords a good basis for prediction. In luxury cooperatives,[185] one might infer that a man's "compatibility" often depends largely on his religion or race. While by statute[186] and administrative regulation[187] these have been forbidden as criteria for restricting access to housing, they nonetheless have been widely applied. In general, managements of cooperatives, by rejecting without opinion or by finding some legitimate pretext, have been able to be discriminating in their selection without serious challenge.[188]

The reasonableness of a restraint ought not to depend on a mechanical distinction between freeholds and leaseholds.[189] The proper function of a court is to balance the legitimate benefits to be derived from the restriction against the inconvenience, possible economic loss, and impairment of free choice that it is likely to cause.[190] If the burden of providing an alternative sale were left on the unit owner after his customer had been turned down,[191] a court would probably find on balance that the restraint was unreasonable. The balance is more nicely drawn when the venture is bound to match the offer that it refuses to sanction. Because this resembles the garden-variety right of first refusal, a court is likely to give approval, unless its demonstrable purpose be to facilitate discrimination.[192]

NOTE:

While the condominium concept is frequently associated with lower-priced residential accommodation, it is by no means exclusively confined to that sphere.

The following plans and table are taken from an Offering Plan for the Galleria Condominium on East 57th Street in New York. The total purchase price of all 253 residential units was $45,040,476. Unit 52/53-A, as shown in the table, was selling for about $1.2 million.

NOTE:

Mortgagees were,at first,reluctant to get involved in condominium financing. The major reason for this was an unfamiliarity with law relating to condominiums, especially the degree of interdependency among unit owners and the distinction between units and common elements. This has changed, however, and mortgage and trust companies are now more comfortable with condominiums and more willing to provide financing. The next excerpt deals with one method of mortgage financing presently employed.

J.A.F. MacDonald, "The Nova Scotia Condominium Act" in The Law and Condominium Development, Proceedings of a Conference held at Dalhousie University, 1973, p. 11, at 21.

The mortgage procedure that I think is in vogue is a standard procedure in which the developer will go to a mortgage lender who will first of all agree to the concept and then agree to provide the money. Then a blanket mortgage, i.e. a mortgage on the whole property, is put on before construction starts. Advances are made against that by the developer. At the point in time at which the documents are accepted for registration, of course, by virtue of the Act, the mortgage along with the title is fractured into whatever number of units you are dealing with. The practice is simply to roll that over to get a release of the blanket mortgage, and the developer puts on, or the purchasers in succession put on, individual mortgages on the particular units. And, if its a true roll-over situation dealing with say one mortgage lender who is making the advances and making the individual mortgages, he will apportion the draws, because the draws are being processed on the basis of separate units. That's all the information that's given at that moment, but that is backed up by individual progress inspection reports on separate units, so it's a relatively simple matter for the lender to, when the roll-over occurs, to allocate it and to say there's $10,000 advanced on this unit and there's $25,000 on this one because it's finished and occupied. The only thing is to make sure that the mortgage company understands what it's doing. They sometimes understand the concept but they don't give an awful lot of thought to the mechanics of doing this change over and getting a separate card set up, for instance. That is one of the reasons why there is about a ten day gap between the time at which the Registrar accepts, and the time at which the developer's lawyers are going to be in a position to close. They have to make sure that all of those change overs have in fact occurred in the interim, and as a personal comment, because I know that come next month there's going to be a lot of people calling me and saying "OK where's my deed", I need ten days, and so will you if you're acting for a developer.

NOTE:

Some of the more important issues arising out of this statutory framework will be presented and analyzed in the succeeding sections of this Chapter. However, it might be useful to you to have an overview now of the sort of difficulties that have arisen.

Ontario has had Condominium legislation since 1967. In 1976, the provincial government established the Ontario Residential Condominium Study Group (The Kealey Commission) to identify, examine, and suggest methods for alleviating problems that have appeared under the legislation. Atthe time of writing (November, 1977), the Committee's report is expected imminently.

As part of its study, the Committee held a great many public hearings and received 127 written briefs. The briefs were studied by Bradley N. McLellan as part of a Directed Research Programme at the Faculty of Law, University of Toronto. The briefs were assigned to one of four categories by source of submission. The groups of brief submitters (and numbers of briefs) were unit owners (who were not on the boards of directors of condominium corporations (16); condominium corporations (all unit holders or the executive of the corporation);(60) municipal governments (1.5); and special interest groups (Canadian Bar Association, Trust Companies, Urban Development Institute, Property Management companies) (36). The areas of concern and frequency of identification of the main concerns of the briefs, are indicated on the chart reproduced below (from p. 6 of Bradley McLellan's Directed Research Paper, Current Problems Facing Condominium Purchasers and Owners - The Need for Reform of Ontario's Condominium Legislation", April 1977):